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No. 71-414

In the Supreme Court of the United States

OCTOBER TERM, 1971

VULCAN MATERIALS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is reported at 308 F. Supp. 53. The opinion of the court of appeals (Pet. App. 3a–20a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1971 (Pet. App. 1a). A petition for rehearing was denied on June 25, 1971 (Pet. App. 2a). The petition for a writ of certiorari was filed on September 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether organization and reorganization expenses incurred by petitioner's predecessors, and

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admittedly capital in nature and nondeductible when incurred, became deductible upon the occurrence of subsequent corporate mergers.

2. Whether one of petitioner's predecessors acquired two other corporations for the principal purpose of tax avoidance, so that the former's net operating loss carryovers were properly disallowed under Section 269(a)(2) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

The pertinent provisions of Section 269 of the Internal Revenue Code of 1954 are set forth in the Appendix to the petition (p. 32a).

STATEMENT

In December, 1954, Consumers Company (Consumers) and Frontier Chemical Company (Frontier), both Delaware corporations, were merged into a third Delaware corporation, Follansbee Steel Corporation (Follansbee). Prior to this merger, Follansbee disposed of all of its operating assets. At the time of the merger, Follansbee owned approximately nine million dollars in liquid assets and had an unused net operating loss carryover of approximately six million dollars. In the merger proceedings, the name of the surviving corporation was changed from Follansbee Steel Corporation to Union Chemical and Material Corporation (Union Chemical). Three years later, in December, 1957, Union Chemical merged into Vulcan Materials, a New Jersey corporation, petitioner here. Each of these mergers constituted reorganizations within the meaning of Section 368(a)(1)(A) of the Internal Revenue Code of 1954. (Pet. App. 4a.)

Between 1934 and 1946, predecessors of petitioner incurred various organization and reorganization expenses, all of which are conceded to be capital in nature and thus not deductable when paid or incurred. Union Chemical deducted these expenses on its 1957 income tax return. The Commissioner disallowed the deductions on the ground that the expenses remained capital in nature and, therefore, were not deductible upon merger. (Pet. App. 4a.)

The Commissioner also determined, pursuant to Section 269(a) of the Internal Revenue Code, that Union Chemical was not entitled to carryover and deduct on its 1957 return Follansbee's pre-merger (1954) net operating loss. This determination was premised on the Commissioner's finding that Follansbee's acquisition of Consumers and Frontier was for the principal purpose of enabling Follansbee to use its net operating loss carryforward to reduce the income generated by the businesses of Consumers and Frontier, which were continued by the surviving corporation after the merger. (Pet. App. 5a.)

These suits for refund followed. The district court sustained the Commissioner's determinations, and the court of appeals affirmed (Pet. App. 3a–20a).

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for further review.

A. THE ORGANIZATION EXPENSE ISSUE

1. It is settled that organization and reorganization expenses, which result in the acquisition of an asset

having an indefinite useful life, are capital in nature and not deductible when paid or incurred. See, *e.g.*, *General Bancshares Corp.* v. *Commissioner*, 326 F. 2d 712 (C.A. 8), certiorari denied, 379 U.S. 832; *Godfrey* v. *Commissioner*, 335 F. 2d 82, 85 (C.A. 6), certiorari denied, 379 U.S. 966. It is likewise settled that upon the dissolution and liquidation of a corporation, capital expenditures previously incurred—but not deducted—become deductible, since they no longer have any value to the business. See, *e.g.*, *Bryant Heater Co.* v. *Commissioner*, 231 F. 2d 938 (C.A. 6); *Koppers Co.* v. *United States*, 278 F. 2d 946 (Ct. Cl.). But this latter rule has uniformly been held inapplicable in a merger, where the rights, franchises, and privileges acquired as a result of previous organization expenditures continue to be enjoyed by the surviving corporation. See, *e.g.*, *Citizens Trust Co.* v. *Commissioner*, 20 B.T.A. 392; *Motion Picture Capital Corp* v. *Commissioner*, 32 B.T.A. 339; *Addressograph-Multigraph Corp.* v. *Commissioner*, P–H Memo T.C., par. 45,058.

Contrary to petitioner's claim (Pet. 21–23), it is immaterial whether the constituent corporations in a merger were organized in different states or the same state. In either event, the surviving corporation enjoys to a similar degree and extent as its predecessors the benefits which resulted from their organization and reorganization expenditures.

2. There is no conflict, even in principle, with *Marr* v. *United States*, 268 U.S. 536, which involved a wholly different issue. The Court there concluded that the shareholders' stock interest following the dissolution of a New Jersey corporation and the emergence of a

Delaware corporation was substantially different from what it had been prior to the dissolution. The instant case lacks both a dissolution and facts to suggest that any valuable interest held prior to the merger was lost upon the occurrence of the merger. Moreover, *Marr* involved a taxable year prior to the enactment of the reorganization provisions of the Code whose basic concept is that the surviving corporation in a tax-free reorganization continues the businesses of the predecessor corporations. As for the cases involving the now repealed documentary stamp tax, upon which petitioner also relies (Pet. 22–24), it is enough to point out that they deal with the unrelated problem of the application of the stamp tax to the documents evidencing the termination of the acquired corporation's entity, and not with the question whether that corporation's business is carried on by the surviving corporation.

B. SECTION 269 ISSUE

1. Section 269(a)(2) of the Internal Revenue Code provides that if one corporation acquires property of another previously uncontrolled corporation for the principal purpose of avoiding income taxes by obtaining the benefit of a deduction that would otherwise have been unavailable, the deduction shall be disallowed. Here, in 1954, Follansbee acquired property from previously uncontrolled corporations, Consumers and Frontier, and after the acquisitions, Follansbee's stockholders owned 57 percent of the stock of the surviving corporation, Union Chemical. This satisfies the 50 percent control requirement under Section 269(a). And both courts below found that the principal pur-

pose of Follansbee's acquisitions was to permit it to offset its net operating loss carryover against the post-merger profits generated by the acquired corporations' businesses.

2. It is settled that the proscription of Section 269 applies where, as here, the acquiring corporation is the loss corporation, as well as in cases where the loss corporation is the acquired corporation, so long as the principal purpose of the acquisition was tax avoidance. See, *e.g., Southland Corp.* v. *Campbell,* 358 F. 2d 333 (C.A. 5); *Ach* v. *Commissioner,* 358 F. 2d 342 (C.A. 6). There is no basis for petitioner's claim to the contrary. Nor is there any conflict with *Maxwell Hardware Co.* v. *Commissioner,* 343 F. 2d 713 (C.A. 9). In that case, unlike this one, it was found that the acquiring parties did not obtain the requisite 50 percent control and, therefore, that Section 269 was inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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